

Overview of Ninth Circuit’s Phased Management Plan

Although many circuits have a considerable capital habeas caseload, the Ninth Circuit has the most formalized structure for case management of its capital habeas cases. This section describes the phased case-management plan developed by the Ninth Circuit over the last several years.

The Ninth Circuit Judicial Council has formalized the capital case management procedures throughout its district courts by directing them to adopt a comprehensive case management plan, based on a template developed by its Criminal Justice Act (CJA) Oversight Committee.¹ These case management plans organize the budgeting and filing procedures for capital habeas corpus cases at each stage of review in order to give the district judge active control over the course of the litigation. The plans reduce premature filings and unnecessary expenditures, as attorneys must have court approval for any work they perform or paper they file. Nearly every district in the Ninth Circuit with a capital caseload has followed the judicial council’s directive and adopted a case-management plan, modified to the particularities of its court, and incorporating flexibility for judges to make individualized decisions specific to each case.²

The model case-management plan divides a capital habeas corpus case into five major phases, identifying the tasks likely to be accomplished during each phase.³ Budgeting is a central part of each phase for cases in which the petitioner is represented by CJA-compensated counsel. Because capital habeas corpus litigation can be unpredictable, the phased budgeting scheme arranges for counsel to prepare separate budgets as the case proceeds over time. Before the case-management conference held at each phase, petitioner’s counsel submits to the court a budgeting plan for that phase.⁴ At the case-management conference for each phase, the court addresses substantive and procedural matters with both counsel and then privately reviews the proposed budget with petitioner’s counsel, making modifications if necessary before final approval. After the judge

1. See *supra* section III.C for discussion of this committee (cross-references are to main report).

2. For example, if a judge thinks that the court will be granting relief based on the guilt part of the trial, the parties might be directed not to brief penalty issues.

3. The identification of these phases is not an exact science, since it is impossible to predict exactly how much time will be necessary for each task. The plan leaves room for appropriate adjustment by each judge based on the specific circumstances applicable at a given time.

4. In submitting these budgets, counsel use standardized forms and Excel software spreadsheets supplied by the court. The computerized forms depict each phase and include instructions for proper input of new data. See, e.g., Appendix A-4 (Capital Case Management Plan—Central District of California). In the Northern District of California, this form is available via the Northern District’s Web site (www.cand.uscourts.gov). Additional budgeting information for attorneys available on that website is reproduced in Appendices C-1 through C-4, forms that have been developed to serve as simple tools for both attorneys and the court to track actual hours and expenses. Attorneys fill out these forms, then submit them to the judge for authorization, usually preceded by review and recommendations by court staff. Eventually, the Ninth Circuit plans to implement automated CJA voucher forms that can generate charts showing visual snapshots of how actual costs are progressing as compared to the budget.

has approved the budget, the CJA Oversight Committee forwards it to the Ninth Circuit Judicial Council for review and approval. Counsel need not wait for Judicial Council approval (which often can take up to three months; the council meets quarterly) before commencing work; once the district court authorizes the budget, counsel may perform the tasks listed.

Responses in the Ninth Circuit to the case-management plans and their corresponding budgeting programs generally have been positive. Most judges and court staff are pleased with the control it gives them over the flow of a case, and Joan Anyon, CJA supervising attorney for the Northern District of California, who helped draft the model plan, reports that habeas corpus counsel in her district appreciate the additional judicial involvement and guidance, as well as the benefits of formally working out the details of the case at the outset of habeas corpus litigation. The attorneys also reportedly appreciate the budgeting aspect of the plans, in that it creates a predictable and timely payment structure for their work.

Below is a brief, generalized overview of each phase of the Ninth Circuit's case management plan. Specific application may differ between courts, especially in phase distinctions and timing, as illustrated in the case-management plans provided in Appendices A-2 through A-5.

Phase One: Appointment of Counsel and Preliminary Investigation⁵

Phase One covers the appointment of counsel, assembly of the state record, and some preliminary record review and investigation. It generally begins with a request for appointment of counsel or a stay of execution and a request to proceed *in forma pauperis*. The court takes jurisdiction over the case with the request for counsel (pursuant to *McFarland*⁶) and the case is assigned to a judge.⁷ The judge then appoints counsel from the federal defender's office or from a list of qualified attorneys, depending on the practice of the court.⁸

5. The division of events to occur in each phase varies in detail from district to district, with some collapsing the first two phases into one, for example. The outline provided here is a generalized picture derived from a review of all case-management plans circuit-wide.

6. See *supra* section II.A.

7. In the District of Arizona, the case is first assigned to the District Judge Capital Case Coordinator who provides for expedited consideration of the stay and appointment orders. After this judge has issued an order of appointment and general procedures, the case is randomly assigned to a district judge for the duration of the case. See Appendix B-2 (Case Management Plan—District of Arizona).

8. See *supra* section II.A.1 for a discussion of different approaches to habeas counsel appointment. In the Districts of Arizona and Montana and the Central and Eastern Districts of California, a judge is expected to appoint the Federal Defender unless a conflict or other circumstance requires the appointment of private CJA counsel. Some districts expect that a judge will appoint second counsel (e.g., Central District of California), but others do not assume that a judge will appoint co-counsel (e.g., the Districts of Montana and Arizona). See Appendices A-2 (Case-Management Plan—District of Arizona), A-3 (Case-Management Plan—District of Montana), A-4 (Case-Management Plan—Central District of California). In the Northern District of California, the judge is to assess whether one or two counsel are necessary. See Appendix A-5 (Case-Management Plan—Northern District of California).

After appointment of counsel, the court issues a scheduling order setting the first case-management conference within twenty or thirty days of the date of the order and outlining the court's general procedures for capital habeas corpus litigation, including the necessary preparation prior to the conference (such as submission of the case evaluation form by both parties) and, if counsel is a CJA-compensated attorney, the order includes details on budgeting procedures (e.g., filling out of case evaluation forms, submission of budgets and vouchers, hourly rates, and approved expenses).⁹ CJA-compensated attorneys also receive detailed documents to assist them in following the new budgeting procedures.¹⁰ The budgeting process is then set in motion with counsel's completion of a "case evaluation form" (provided by the court),¹¹ budget, and declaration. The judge then holds budgeting conferences as needed over the course of the litigation (usually in conjunction with a case-management conference for that phase). To complete the case evaluation form, petitioner's counsel consults with investigators and begins gathering the state record for the case.

Prior to the first case-management conference, the death penalty law clerk or CJA supervising attorney¹² may review the case and prepare a memorandum for the judge's use at the conference.¹³ At the conference, the judge discusses with counsel the complexity of the case, as well as important preliminary issues such as limitation deadlines, an appropriate timetable for future filings, and the date of the next conference.¹⁴ (Some of these issues may be resolvable at this time, such as invoking equitable tolling, or waiver of claims or defenses by either party.) If the petitioner's counsel is CJA-funded, then the judge excuses respondent's counsel and conducts a private budget-management conference with the petitioner's counsel.¹⁵ At this budgeting conference, the court reviews petitioner's case evaluation and budget, as well as anticipated travel expenses, clarifying and confirming the court's budgeting policies set out in the previous order. The court also

9. See, e.g., Appendix B-8 (General Procedures Order—Central District of California, noting that the case will be governed by the district's case-management and budgeting plan).

10. In the Northern District, for example, attorneys are given a summary overview of budgeting in the Northern District of California; the Supplemental CJA Guidelines for Capital Habeas Cases; a case evaluation form as well as case management and budget forms for all five phases of the case; the CJA manual; and the local rules for the Northern District of California. See Appendices C-1 through C-4. These documents are available to counsel and the public via the internet. See www.cand.uscourts.gov (Northern District of California).

11. Some district courts require only petitioner's counsel to submit a case evaluation form, while others require both petitioner's and respondent's counsel to submit the form. For budgeting purposes, only the petitioner's form is relevant. See Appendix C-2 (Case Evaluation Form—Northern District of California) for an example of a case evaluation form.

12. See *supra* section III.B for details on the position of CJA supervising attorney.

13. This is the norm in the Central District of California.

14. The case-management conference in this and later phases should not be lengthy, though its duration will depend on case complexity and the issues under discussion for that phase.

15. It is important that this meeting be confidential between the judge and the petitioner's counsel because matters of strategy and witness development are involved. While knowledge of these matters is essential to the determination of an appropriate budget, disclosure to opposing counsel of this information at this stage would be improper.

decides additional representation issues, such as whether to appoint one or two counsel and the appropriate rates of compensation for each attorney.¹⁶ Most districts provide for budget approval by the district judge within ten days of budget submission, or sooner if possible.

Following this first case-management conference, the court issues an order memorializing the agreements made during the conference, outlining the procedures to be followed throughout the course of the habeas corpus litigation, including reference to applicable local rules, and setting the dates for the next conference and budget submission (usually ten days before each conference). The conclusions of the budgeting conference are set forth in a budget management order, filed under seal. This order also clarifies the court's policies for compensation of attorney work (e.g., counsel is paid for time spent in preparation of budget and case evaluation forms but not for voucher preparation, and vouchers will be reviewed for compliance with the proposed budget).¹⁷

Phase Two: General Record Review and Investigation

The second phase involves general record review and investigation. During this phase, counsel continues to assemble and review the state record and conduct investigations, including meeting with the petitioner. At a second case-management conference, the judge and both counsel address issues such as what falls within the “reasonably necessary” standard for granting pre-petition resources, and the scope of juror investigations.¹⁸ The court might also explore settlement possibilities at this conference, in the form of limiting litigation to the penalty or special circumstances parts of the trial or waiving claims or defenses. The judge investigates with the parties a realistic timetable to complete review of the state record¹⁹ and petitioner's history, and to conduct research on each major issue, taking into account the length of the record and other pertinent considerations. Most importantly, the judge sets a deadline for filing the petition, within as short a time as possible, and perhaps also deadlines for the answer,²⁰ reply and traverse, though these deadlines may be set in a later conference. Finally, the judge and attorneys confirm the date of the upcoming third case-management conference, to be held shortly after the expiration of the deadlines set at this second conference.

16. For example, the Central District of California sets the lead counsel's rate at \$125/hour, co-counsel at \$100/hour, and all other attorneys, except *Strickland* experts, at \$65/hour. See Appendix A-4 (Capital Case Management Plan—Central District of California).

17. See, e.g., Appendix B-8 (General Procedures Order—Central District of California).

18. The same preconference preparation—case evaluation form and budget submission, and staff review of these documents and briefing to the judge—is again performed, prior to the start of each conference.

19. Several districts' case-management plans indicate that counsel should report if there is difficulty obtaining a complete record, and the court will offer assistance, such as issuing a *subpoena duces tecum*, as appropriate. See, e.g., Appendices A-4 (Case-Management Plan—Central District of California) & A-5 (Case-Management Plan—Northern District of California).

20. Guidelines for these deadlines differ between districts. The Central District of California, for example, requires the answer to be filed within thirty days of the petition filing; the Northern District provides for twenty days after such filing; and the District of Arizona allows sixty days from the petition.

The second case-management conference may also include a second budget management conference held *ex parte* with CJA-funded counsel, at which the court reviews and approves the proposed Phase Two budget and the breadth of investigation for that phase, allowing the court to limit investigations to avoid “fishing expeditions.”²¹ This meeting also addresses the division of labor between co-counsel and between counsel and paralegals (keeping alert to avoid duplication of efforts); guideline rates for investigators, paralegals, and associates; and related standards such as page rates for record review.²² (By statute, authorized fee amounts must be made public after the close of the case;²³ details of the budgets submitted by petitioner’s counsel are all kept under seal, pursuant to the Ninth Circuit Judicial Council’s case-management plan guidelines.) The judge approves the Phase Two budget at or shortly after this budgeting meeting. Phase Two ends with an order memorializing the conclusions of the case-management conference and setting dates of the next events, most significantly the deadline for filing the petition.

Phase Three: Preparation and Filing of Petition for Habeas Corpus

This phase encompasses the preparation and filing of the petition for habeas corpus. The judge holds a third case-management conference to confirm briefing deadlines, address frivolous exhaustion motions, and set the extent of post-conviction resources and allowed pre-hearing discovery, all with the judge still maintaining control of the breadth of the investigation. Counsel will identify the major procedural and substantive issues to be pursued and describe the necessary time anticipated for each, as well as the number of experts and investigators needed and their expected activities. Budget issues discussed during this phase include the establishment of guideline rates for the use of proposed experts (e.g., mitigation, “Strickland,”²⁴ psychologists) and social historians, if proposed. (The judge must approve in advance any expenditures that exceed those authorized.) By this time, the attorneys have submitted some CJA vouchers for reimbursement of expenses and the court has begun its process of voucher review, whether by a CJA supervising at-

21. Although the “one-shot” regime created by *McCleskey* (see *supra* section I.D) requires counsel to perform as much investigation as possible on all potential grounds for relief so that all possible claims are included in the first petition, the court and parties are both aware that there should be some factual basis for a request to pursue a particular avenue of investigation. With the case-management plan and its required proposed budgets and case evaluation forms, the court can establish reasonable limits on such investigation in advance, thus minimizing unnecessary litigation and also disappointment to counsel if work already performed is later denied compensation when submitted in a CJA voucher.

22. 21 U.S.C. § 848(q)(10) (West 2004). Section 848(q) caps funding for investigators and experts at a total of \$7,500, unless the district or magistrate judge certifies additional expenses as “necessary to provide fair compensation for services of an unusual character or duration” and the chief judge of the circuit approves the excess amount. *Id.*

23. 18 U.S.C. §§ 3006A(d)(4), (e)(4) (West 2004); 21 U.S.C. § 848(q)(10)(C) (West 2004).

24. A “Strickland” expert is a lawyer who can testify about the standard of care necessary in counsel representation, used to determine whether a petitioner’s trial counsel performed competently. *Strickland v. Washington*, 466 U.S. 668 (1984).

torney (Northern District of California), death penalty law clerks,²⁵ or other court staff. Staff reviewing the vouchers check the expenses listed for reasonableness and for compliance with the proposed budget, and bring any problems to the attention of the attorneys, and if not reconciled, then to the judge.

The most significant event during this phase is the filing of the petition for writ of habeas corpus. After filing, the judge and death penalty law clerks begin review of the claims asserted. Judges should allocate time explicitly for ruling on the procedural status of the claims to ensure that these decisions are rendered in a timely manner. If the petition appears to include both exhausted and unexhausted claims, the court faces the question of whether to consider the merits (if denial of relief looks likely) of staying the exhausted claims to allow the unexhausted claims to be litigated in state court and then later filed in an amended petition, or dismiss the entire petition subject to refiling after exhaustion.²⁶ (The implications of this choice are significant, especially in light of the new limitation rules after the AEDPA.²⁷) As an example of one court's approach to this situation, the Central District of California's case-management plan states that if the respondent waives exhaustion,²⁸ the court will entertain the unexhausted claims.²⁹ Without a waiver of exhaustion, however, there is not yet a uniform treatment of what to do with the petition during state exhaustion proceedings. If the judge stays the case, then federal proceedings are suspended until the case returns from state court with an amended petition. If the judge dismisses it altogether, then federal proceedings will reset to Phase One with a successive petition filed after the completion of state exhaustion.

After the petition is filed, the parties may meet and confer on the question of exhausted or unexhausted claims.³⁰ They might also undertake discovery if the court approves. (Rule 6 of the Rules Governing § 2254 Cases states that there is no automatic right to discovery in habeas corpus proceedings, but that a court may order discovery upon a party's request, at its discretion, for "good cause shown."³¹)

25. Most district courts provide for voucher submission every thirty to sixty days. *See, e.g.*, Appendices C-8 (General Procedures Order—Central District of California; setting thirty days) & B-2 (Case-Management Plan—District of Arizona; changing previous thirty-day schedule to submission every sixty days).

26. *See supra* section II.C for discussion of this dilemma in light of relevant substantive law.

27. *See supra* section II.C for details.

28. If the respondent plans to waive exhaustion, it must file an answer within a designated deadline after service of the petition (e.g., thirty days in the Central District of California, forty-five days in the Northern District of California). *See* Appendices A-4 (Case-Management Plan—Central District of California) & A-5 (Case-Management Plan—Northern District of California).

29. If there is no such waiver, then the respondent's counsel must make a good faith effort to confer with the petitioner's counsel regarding these claims (the Northern District of California has a similar requirement, setting a deadline of fifteen days within which this meeting must take place; *see* Appendix A-5 (Case-Management Plan—Northern District of California)). After the meeting, the parties file a joint statement describing what they agree and disagree on regarding exhausted claims.

30. The case-management plans for the Northern District of California and the District of Montana direct the petitioner to identify in the petition where in the record each claim was exhausted. *See, e.g.*, Appendices A-3 & A-5.

31. *See Harris v. Nelson*, 394 U.S. 286 (1969) (holding that a district court has discretion to order discovery when it would help the court make a reliable determination with respect to petitioner's claim). Rule 6

Phase Four: Answer, Reply, Motion for Evidentiary Hearing

Phase Four sees the state's filing of an answer and briefs addressing exhaustion, procedural default, and other defenses, as well as the petitioner's reply and motion for evidentiary hearing (if one is requested) and briefing on all claims not subject to an evidentiary hearing motion, according to deadlines set by the district court.³² During this phase, the judge holds another case-management conference³³ to establish what time and resources will be needed to research and brief issues such as procedural default and exhaustion, the judge being alert to avoid unnecessary briefing to conserve time and cost. The judge will also address the appropriateness of any summary judgment motion submitted by the respondent, keeping in mind that since such motions are generally denied, the cost of the petitioner responding to the motion could be avoided. Exhaustion issues may also be addressed now, and the judge might consider ordering the attorneys to meet and confer if mutual resolution in this area seems plausible. In the budgeting part of the conference, the judge continues to review and approve counsel's budget, overseeing the extent of discovery conducted and the breadth of petitioner's investigation, such as the use of social historians and psychiatric, mitigation, and *Strickland* experts. Finally, if an evidentiary hearing is to be requested, the motion will be filed during this phase, and the judge will order appropriate briefing and additional case-management scheduling to consider the motion.³⁴

If the court determines that an evidentiary hearing will be held, it will order a transcript of the hearing to be prepared and provided to the parties for use in briefing and argument. If there is to be no evidentiary hearing, then the court will proceed to order appropriate briefing on the merits and proceed to judgment. As in earlier phases, the judge should evaluate the claims and avoid unnecessary briefing to conserve time and cost, and issue an order accordingly.³⁵ Also, as in earlier phases, the court continues to monitor attorney adherence to the established budget and deadlines.

does not address the question of whether discovery is allowed before a habeas petition is filed, *Calderon v. United States Dist. Court for the N. Dist. of Cal. (Nicolaus)*, 98 F.3d 149 (9th Cir. 1997), but the Ninth Circuit has disallowed such discovery, *Calderon v. United States Dist. Court (Nicolaus)*, 98 F.3d 1102 (9th Cir. 1996), and has also held discovery to be inappropriate where a petition contains unexhausted claims not yet dismissed or pursued in state court. *Calderon v. United States Dist. Court for the E. Dist. of Cal. (Roberts)*, 113 F.3d 149 (9th Cir. 1997).

32. The Central District of California, for example, requires a motion for evidentiary hearing to be made within twenty days from the filing of the traverse (or expiration of time for such filing). See Appendix A-4 (Case-Management Plan—Central District of California).

33. The District of Montana's case-management plan provides that this conference be held within three weeks after the filing of the answer. See Appendix A-3 (Case-Management Plan—District of Montana).

34. See, e.g., Appendix E-3 (Evidentiary Hearing Scheduling Order—Central District of California).

35. The Central District of California recommends that judges have the parties identify all claims that are based on the record to make clear that such claims will not be the subject of a motion for evidentiary hearing. See Appendix A-4 (Case Management Plan—Central District of California).

Phase Five: Evidentiary Hearing, Final Briefing and Judgment

The final phase covers the rare instance of an evidentiary hearing in a capital habeas corpus case, if the judge determines one is warranted, as well as the final briefing and ultimate ruling on the petition. A fifth case-management conference takes place, covering discovery relating to the hearing, the conduct of the hearing (issues to be addressed), and relevant briefing. The judge will investigate the likely extent of the necessary discovery, depositions of witnesses, and interrogatories, suggesting ways to use court time and money efficiently, including fact-finding based on documents, depositions, review of declarations, and stipulation of counsel in addition to oral testimony. Budget issues in this phase include the costs of deposing witnesses and propounding interrogatories.³⁶ Judges often encourage settlement between the parties on as many issues as possible. Finally, the court will assess the time and resources counsel will require for post-hearing briefing and post-judgment motions (e.g., to amend and appeal), and authorize the budget accordingly, keeping in mind an assessment of viable issues and directing counsel to limit briefing to those issues. Finally, if none of the procedural hurdles has disposed of the case, the judge reviews the merits of the petition and the case proceeds to judgment. The judge also rules on any outstanding non-evidentiary hearing claims and sets deadlines for post-judgment motions and on the time required to issue opinions on these motions. If habeas corpus relief is denied, petitioner may then file a notice of appeal and request for certificate of appealability, which the district judge must rule on before the case can be appealed to the court of appeals.³⁷

36. Section 1825(b) of Title 18 of the U.S. Code and Rule 6 of the Rules Governing Section 2254 Cases address the costs for witnesses (i.e., which party pays for fact witnesses and expert witnesses). Federal Rules of Civil Procedure 26(a) and (b) cover the applicability of discovery regarding experts. Rule 26(b)(4)(c) authorizes the court to direct the respondent to pay expert fees and for the petitioner to pay a reasonable fee for time spent responding to discovery directed at the expert.

37. See *supra* section I.K for more details.